IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 346 OF 2005

MRS. PRISCA CARDOZO ALIAS PRISCA CARDOZO BARRETO, CHANDOR, GOA, ...Petitioner

Versus

MR. CIRILO ANTONIO MENDES AND 2 ORS., ...Respondents

Shri Nitin Sardessai, Advocate for the Petitioner.
Mr. C.A. Coutinho, Advocate for Respondent No.1.

Coram:- D. D. SINHA, J.

Date:- 7th December, 2005

P.C.:

Heard Mr. N. Sardessai, learned Advocate for the Petitioner and Mr. C. Coutinho, learned Advocate for Respondent No.1.

2. Writ Petition is directed against the Order dated 4.7.2005 passed by the ad hoc Addl. District Judge whereby the application moved by the petitioner/plaintiff for appointment of Commissioner below Exh.D-65 came to be rejected. The counsel for the petitioner contended that the petitioner is an old lady of 84 years of age and because of her critical health and illness she could not appear before the Court to give evidence and therefore in the earlier point of time application was moved for appointment of Commissioner for recording evidence of the petitioner. Learned counsel contended that instead of allowing the application for appointment of Commissioner for recording of evidence of the petitioner the trial Court has suggested to the plaintiff to get her evidence recorded through her power of attorney holder. The learned counsel contended that the plaintiff has accepted the suggestion of the Court and submitted that the evidence of the plaintiff could be recorded through power of

attorney holder. It is further contended that though the evidence of the power of attorney holder of the plaintiff and one more witness of the plaintiff is over, however the facts which are only in the personal knowledge of the plaintiff can be deposed by the plaintiff in her evidence. However, since the plaintiff was not in a position to attend court because of her age and ill health, she filed another application dated 18.6.05 again seeking permission to appoint Commissioner for recording evidence of the plaintiff. It is contended that the trial Court dismissed the said application without any justification which has resulted in grave prejudice to the plaintiff/petitioner and therefore the order impugned is bad in law and hence the present Writ Petition.

3. It is contended that since the suggestion was given by the Court, the petitioner produced evidence through power of attorney holder. However, in view of the above referred facts, it was necessary for the petitioner to depose before the Court in respect of the facts which are only within her personal knowledge. The second application was moved for appointment of Commissioner to record the evidence of the plaintiff. It is contended that under S.151 of C.P.C. the application ought to have been allowed and the Commissioner should have been appointed to record the evidence of the petitioner.

4. The counsel for the respondent No.1 on the other hand supported the impugned order and contended that the second application dated 18.6.05 filed by the petitioner for appointment of Commissioner only discloses that the petitioner is of 85 years of age and is critically ill and not in a position to appear in Court and therefore the Commissioner should be appointed. It is contended that the power of attorney has already adduced evidence on behalf of the petitioner/plaintiff and the Court was justified in rejecting the application of the petitioner.

5. I have considered the contentions canvassed by the respective counsel and perused the impugned order. In the instant case it is not in dispute that the power of attorney has already adduced evidence on

behalf of the petitioner since she is infirmed and an old woman and could not attend the Court for giving evidence. Having done so, there is no provision in law to permit the petitioner to record her evidence for the second time, particularly when the evidence of another witness has been adduced. Similarly it is difficult to appreciate as to how the court can suggest to the litigant to do a particular thing or not to do a particular thing. Be that as it may, in the instant case evidence of the plaintiff having been recorded through her power of attorney holder, there is no occasion for the plaintiff to move an application for appointment of Commissioner for the purpose of recording her own evidence.

6. In that view of the matter no case is made out. Writ Petition dismissed.

D. D. SINHA, J.

sl.